No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF LARRY ALEXANDER, RALPH BROWN, ALAN DERSHOWITZ, DAVID GOLDBERGER, GERALD GUNTHER, NAT HENTOFF AND DIANE ZIMMERMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of Larry Alexander, Ralph Brown, Alan Dershowitz, David Goldberger, Gerald Gunther, Nat Hentoff, and Diane Zimmerman as amici curiae in support of affirmance of the decision of the

Wisconsin Supreme Court below, holding that the Wisconsin hate crimes statute, section 939.645 Stats., violates the First and Fourteenth Amendments to the United States Constitution. The amici are all writers and scholars on constitutional law and/or the First Amendment right of freedom of expression, who have a long-standing belief in the importance of the freedom of thought.

STATEMENT

It is the position of the Amici that the First Amendment right of free expression, United States Constitution Amend. I, as applied to the states through the Due Process Clause of the Fourteenth Amendment, United States Constitution Amend. XIV, § 1, has properly and consistently been construed by this Court to protect the freedom of thought on political and social issues, even when no communicative act is either involved or intended. Moreover, the freedom of thought protected by the First Amendment includes within it the political or social attitudes that motivate criminal acts. Because as construed by the Wisconsin Supreme Court section 939.645 imposes penalties solely for the holding of particular political or social attitudes, the statute should be found unconstitutional.

ARGUMENT

I.

AS CONSTRUED BY THE WISCONSIN SUPREME COURT, SECTION 939.645 IMPOSES PENALTIES FOR THE HOLDING OF POLITICAL THOUGHTS AND SOCIAL ATTITUDES.

In its opinion below, the Wisconsin Supreme Court held unambiguously that the state's hate crime sentence enhancer, section 939.645 Stats., constitutes the penalization of the holding of racist thoughts:

> Without doubt the hate crimes statute punishes bigoted thought. The state asserts that the statute punishes only the "conduct" of intentional selection of a victim. We disagree. Selection of a victim is an element of the underlying offense, part of the defendant's "intent" in committing the crime. In any assault upon an individual there is a selection of the victim. The statute punishes the "because of" aspect of the defendant's selection, the reason the defendant selected the victim, the motive behind the selection.

State v. Mitchell, 485 N.W.2d 807, 812 (Wis. 1992).

It is well established that this Court, in reviewing a state statute, is bound by a construction of that statute by the state's highest court. As this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945): "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."

Such a principle derives from the precepts of federalism, under which state courts are given primary and ultimate responsibility for the growth and development of state law. This Court is therefore bound by the Wisconsin Supreme Court's holding that section 939.645 penalizes the holding of bigoted thoughts.

II.

THE FIRST AMENDMENT RIGHT OF FREEDOM OF EXPRESSION PROTECTS THE FREEDOM OF THOUGHT.

The inclusion of the freedom of thought within the constitutional protection of freedom of expression is wholly consistent with accepted precepts of American political and constitutional theory. If inherent in the structure of a democratic society is the potential for the citizenry to choose any political course of action (even if, on occasion, only through the supermajoritarian amendment process), the government of such a society cannot be allowed to penalize an individual's holding of any political attitude. For by hypothesis, in a democracy the citizenry has the option ultimately to adopt that particular political attitude. More importantly, the freedom to communicate and persuade, so central to a commitment to societal self-determination, is of little use if both the communicator and listener can be punished for having the thought, either before or after it is communicated. Thus, the freedoms of expression and thought are inextricably intertwined: Attempting to protect one without the other will inevitably prove to be impossible.

There also exists a strong practical basis for recognizing the centrality of freedom of thought in our political system. Citizens cannot be expected to exercise and develop the intellectual and decision making capabilities required to make life-affecting decisions if they must live in constant fear that the government will penalize them for holding particular social or political attitudes. The democratic system, of which the First Amendment is such an essential element, cannot be expected to thrive—or even survive—under such circumstances. *See* Martin H. Redish, *Freedom of Thought as Freedom of Expression:*

Hate Crime Sentencing Enhancement and First Amendment Theory, Criminal Justice Ethics, Vol. 11, No. 2, at 29, 41-32 (1992).

It is not surprising, then, that on numerous occasions, this Court has made clear that the First Amendment protects the freedom of thought, as well as the freedom of expression. This Court has so stated expressly in several decisions. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State").

In a number of other decisions, the need to protect freedom of thought has provided the rationale for the Court's holdings, where activity was found to be protected by the First Amendment, despite the fact that it was not designed to communicate information or opinion. *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (recognizing First Amendment right of school child to refuse to pledge allegiance to the flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (recognizing individual's First Amendment right to cover license plate slogan inconsistent with the individual's religious beliefs). What was being protected in both *Barnette* and *Wooley* is the sanctity of the individual's personal beliefs, a sanctity that would have been violated had the individuals in those cases been forced to accept the government's moral and intellectual orthodoxy.

III.

SECTION 939.645 VIOLATES THE CONSTITUTIONALLY PROTECTED FREEDOM OF THOUGHT.

As construed by the Wisconsin Supreme Court, Section 939.645 imposes penalties solely because of the racial hatred that motivates the criminal behavior in question. In effect, then, this statute penalizes individuals, not for their direct criminal behavior (which is already punishable under preexisting criminal laws), but for their underlying racist or bigoted attitudes. Because such laws have the intended effect of penalizing thought processes and political motivations found to be offensive to those in power, they constitute classic abridgements of the constitutionally protected freedom of thought.

To comprehend the constitutionally problematic nature of such laws, one need only hypothesize a sentencing enhancement law that penalizes political motivations other than racial or religious prejudice. Assume, for example, that a state legislature enacts a law enhancing the sentence for any crime motivated out of a pro-choice belief, or a pro-life belief, or a belief in Communism or political correctness. One could also imagine a state law that made criminal the burning of all flags, but enhanced the sentences only of those found to have been motivated by a desire to cast aspersions on the United States. *See* Larry Alexander, *The ADL Hate Crime Statute and the First Amendment*, Criminal Justice Ethics, Vol. 11, No. 2, at 49, 50-51 (1992). All of these laws unconstitutionally increase criminal penalties because of the offensiveness, to those in power, of the underlying political attitudes. Such enactments could accurately be characterized as "Sacco and Vanzetti" laws, named for the two men who were sentenced to death, in the view of many, not for the crimes they had committed but for their political beliefs.

If one begins constitutional analysis by assuming that because communication is not being impeded, sentence enhancement laws cannot violate the First Amendment protection of expression, then it is logically impossible to find these hypothetical sentence enhancements to constitute First Amendment violations. Yet for reasons already discussed, such laws should be found to threaten core notions of constitutionally protected freedom.

This Court's decision last term in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), provides strong support for the conclusion that sentencing enhancement laws are unconstitutional. There a majority of this Court held that racist expression was as deserving of First Amendment protection as the expression of any other political viewpoint. 112 S. Ct. at 2548. This Court further held that the government could not constitutionally prohibit the use of racist fighting words while leaving other forms of fighting words unregulated, even though "fighting words" as a form of expression are unprotected by the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Similarly, one could posit that while conduct that is the subject of sentencing enhancement laws is not protected First Amendment activity, the selective punishment of such conduct on the basis of underlying viewpoint should also be deemed unconstitutional.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), this Court indicated in dictum that a sentencing judge may, consistent with the First Amendment, take into account in fashioning a sentence a criminal defendant's membership in a racist organization, where that membership was relevant to the underlying criminal conduct. *Id.* at 1097. That dictum should not be deemed controlling in this case, however, because there exists a significant difference between judicial exercise of discretion on the basis of the

totality of the circumstances in an individual case (as in *Dawson*) and a generalized, non-discretionary legislative directive that all sentences that fall within a specified category are to be enhanced.

To the extent that this Court finds the *Dawson* dictum to be controlling here, it is respectfully submitted that this Court should reconsider the merits of the conclusion contained in that dictum. It should be noted that this Court in no way intended to suggest that the *Dawson* defendant's membership was not fully protected by the First Amendment. On the contrary, the opinion fully acknowledged that it was. 112 S. Ct. at 1096-97. Once it is acknowledged that the membership was protected activity, however, it is difficult to understand how adding to the defendant's sentence because of that fact does not impede or penalize the exercise of First Amendment rights. This point can be established by hypothesizing a situation in which a judge enhances a sentence because of his finding that the defendant's hatred for government policies had caused him to commit the crime. In such a case, sentence enhancement, even in an individualized manner, would clearly violate the First Amendment. Because *R.A.V.*—decided after *Dawson*—established that racist speech is as protected as any other subject of expression, the same reasoning should apply when racist attitudes are penalized.

IV.

NONE OF THE ASSERTED JUSTIFICATIONS FOR SENTENCING ENHANCEMENT LAWS JUSTIFIES THE VIOLATION OF THE CONSTITUTIONALLY PROTECTED FREEDOM OF THOUGHT TO WHICH SUCH LAWS GIVE RISE.

Once it is established that sentencing enhancement laws impede the freedom of thought protected by the First Amendment on the basis of underlying viewpoint, it

becomes clear that none of the rationales asserted for such laws can overcome the heavy burden imposed by the strict scrutiny standard on viewpoint regulations. The arguments that have been employed to justify hate crime sentencing enhancement laws against First Amendment attack amount to the following contentions:

1. Racial prejudice presents a unique threat to the well being of our society, and therefore while sentence enhancement for political or social motivations is generally unconstitutional, such enhancement is constitutionally permissible in these particular instances.

2. Crimes motivated by racial or religious prejudice do in fact cause more substantial harm than the exact same crimes when committed without such motivation, because they create terror in the community that lingers long after the particular crime has been committed. Moreover, such crimes are more likely than other crimes to lead to retaliatory violence and social disturbance.

3. If hate crime sentencing enhancement laws are unconstitutional, then so must be the prohibition, contained in Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000-2, of discrimination in employment on the basis of race or religion, as well as numerous other laws that prohibit discrimination.

4. It is well accepted in the law that legal consequences may flow from an individual's state of mind when committing a crime.

Examination of each of these assertions demonstrates their inadequacy. As to the first assertion, if there is one issue that *R.A.V.* resolves, it is that the dangers caused by racism and prejudice are *not* unique for First Amendment purposes. If they were, then hate *speech* laws, such as the one invalidated in *R.A.V.*, would also have to be constitutional—and this Court has made clear that they are not. Nor could they be, if the First Amendment's

well-established theoretical and doctrinal prohibition on viewpoint regulation means anything. *See, e.g., Schacht v. United States*, 398 U.S. 58 (1970) (invalidating congressional ban on unauthorized wearing of American military uniforms in a manner calculated to discredit the armed forces). *See generally* Geoffrey Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

The argument premised on the residual terror of crimes motivated by prejudice has a strong superficial appeal. The theory breaks down, however, when one recalls that hate crime sentencing enhancement laws are designed to eradicate community terror only selectively. Numerous crimes, politically motivated or otherwise, may give rise to such terror, yet sentencing enhancement laws deal only with those that have been motivated by prejudice. The terror argument therefore cannot avoid the viewpoint selectivity that renders sentencing enhancement laws constitutionally suspect. Thus, like the ordinance invalidated in *R.A.V.*, hate crime sentencing enhancement laws are defective because even though they purport to respond to a legitimate state concern, they are underinclusive. The state's legitimate concern, then, could be met by alternatives that are less invasive of First Amendment rights, such as viewpoint-neutral laws that increase sentences when it can be established that the defendant intentionally sought to terrorize a community or that the victims suffered special psychological harm.

The argument that racially or religiously motivated crimes are more likely than other crimes to bring about retaliation or general societal disturbance is unacceptable, because it draws on First Amendment doctrine that has long been discredited. Not since *Gitlow v. New York*, 268 U.S. 652 (1925), has the "tendency" of expression to lead

to criminal conduct provided a sufficient basis for suppression. In *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*), this Court held that advocacy of unlawful conduct could be regulated only "where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such actions." (Emphasis added) Here, in an attempt to justify the penalization of thought, the State merely makes conclusory and speculative assertions about the possibility of harm at some future (and undetermined) date. Even if the *Brandenburg* standard of imminency and likelihood concerning future violence arising from hate crimes could be met *in a particular case*, surely the mere possibility of harm cannot justify a blanket penalization of underlying political thought.

No more persuasive is the argument that invalidation of sentencing enhancement laws would threaten the continued vitality of Title VII or any other anti-discrimination law. There is all the difference in the world between hate crime sentencing enhancement laws on the one hand and anti-discrimination laws on the other. Hate crime sentencing laws punish *nothing more* than internal motivation; preexisting criminal laws already punish the behavior and harmful impact involved. Anti-discrimination laws, on the other hand, punish a concrete, negative impact on individuals. Indeed, discrimination need not even be motivated by prejudice for such a practice to be deemed illegal. Conceivably, an employer's motivation may be limited to the economic concern that his business would not be as successful if he hires individuals of a certain race or religion, yet his discriminatory practices will be deemed just as illegal as if they had been motivated exclusively out of racial hatred.

To the extent that anti-discrimination laws actually could be deemed to penalize underlying political thought, such

an impact would merely be incidental to the government's attainment of its legitimate, nonspeech goal of preventing harm. In this sense, anti-discrimination laws are analogous to the law upheld by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). There this Court held that a law making it a crime to destroy one's draft card is constitutional, despite the fact that such destruction had been employed as part of a political protest. This was because "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important or substantial governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376.

The same cannot be said, however, of hate crime sentence enhancement laws. In the case of hate crimes, the government's legitimate interest in regulating the nonspeech element is satisfied by punishing an individual's criminal acts. No further need—short of the illegitimate desire to punish objectionable beliefs—therefore justifies sentence enhancement on the basis of the defendant's underlying political motivation.

Finally, the fact that the law commonly takes mental state into account is completely irrelevant to the constitutionality of sentencing enhancement laws. The unique defect of such laws under the First Amendment is that they penalize the holding of a particular political or social attitude. For it is those attitudes that are simultaneously inherently intertwined with the systems of free expression and representative democracy, and most vulnerable to the dangers of political repression.

CONCLUSION

It has not been contended by amici that politically-motivated criminal acts are in any manner protected by the First Amendment. Government has the power—indeed the moral obligation—to protect its citizens from physical harm, whatever the motivation for those acts. But hate crime sentence enhancement in no way makes conduct or behavior criminal that was not already subject to punishment.

It should be emphasized that one may find sentencing enhancement laws to be unconstitutional, yet nevertheless find the existence of racist motivations or attitudes to be personally repugnant. As dangerous and offensive as any expression of racism or bigotry may be, considerably more dangerous is any attempt by the government to control the minds of its citizens.

For the foregoing reasons, this Court should affirm the decision of the Court below.

Respectfully submitted,

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